STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: Elizabeth L. Gleicher, Amy Ronayne Krause, and Michael J. Riordan

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

FERONDA MONTRE SMITH

Defendant-Appellant.
_____/

Supreme Court No. 148305

Court of Appeals No. 304935

Lower Court No. 08-23581FC

GENESEE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

VALERIE R. NEWMAN (P47291)
Attorney for Defendant-Appellant

DEFENDANT-APPELLANT'S BRIEF ON APPEAL
(ORAL ARGUMENT REQUESTED)

STATE APPELLATE DEFENDER OFFICE

BY: VALERIE R. NEWMAN (P47291)
KATHERINE L. MARCUZ (P76625)
Assistant Defenders
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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STATEMENT OF JURISDICTION

This Court granted leave to appeal on June 20, 2014. This court has jurisdiction pursuant to MCL 770.3(6); MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. THE RIGHT TO A SPEEDY TRIAL IS ENSHRINED IN THE CONSTITUTION. THE UNITED STATES SUPREME COURT HAS ADOPTED A FOUR-PART BALANCING TEST TO DETERMINE WHETHER DELAY IN TRIAL, ATTRIBUTABLE TO THE STATE, HAS RESULTED IN A VIOLATION OF THIS CONSTITUTIONAL RIGHT. HAS THE STATE'S FAILURE TO BRING MR. SMITH TO TRIAL FOR OVER 18 MONTHS CREATED A PRESUMPTION OF PREJUDICE THAT THE STATE CANNOT OVERCOME?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

II. WITNESS MARK YANCY TESTIFIED HE RECEIVED NO MONETARY CONSIDERATION FOR HIS COOPERATION DESPITE PRIOR TESTIMONY FROM AN FBI AGENT THAT HE WAS SPECIFICALLY RENUMERATED FOR HIS COOPERATION IN THIS CASE. DID THE PROSECUTION 'S FAILURE TO CORRECT THAT PERJURED TESTIMONY, RESULT IN THE DENIAL OF MR. SMITH'S DUE PROCESS RIGHTS TO A FAIR TRIAL?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Following a nine day jury trial in the Genesee County Circuit Court, Mr. Smith was acquitted of three charges: felon in possession of a firearm[1], carrying a concealed weapon[2] and felony firearm[3]. 40a. He was convicted as charged of armed robbery[4] and first-degree felony murder[5] (40a) and sentenced to the mandatory term of life imprisonment for the murder conviction and 250 months to 35 years for the armed robbery conviction. 42a.

This case involved the murder of Larry Pass Jr., a drug dealer who died in his home in November 2005 as a result of being shot eight times. 328a, 329a. Although Mr. Pass was murdered in 2005, the trial in this matter did not begin until May 2011 (37a), despite Mr. Smith being arrested for this crime[6] in mid-December 2007 (1a).

The evidence implicating Mr. Smith came from two witnesses. Mark Yancy testified he was present in the home when the incident took place and Terrance Lard, originally charged as a co-defendant, testified in exchange for a plea to unarmed robbery and manslaughter.

The prosecution's theory was that Mr. Smith shot Mr. Pass and that Mr. Lard and Mr. Yancy were in another room at the time of the shooting. 294a-296a. The defense theory was that Mr. Lard or Mr. Yancy shot Mr. Pass and Mr. Smith was not present or involved. 299a-302a.

Two motions to dismiss were brought (16a; 18a) and denied (189a-195a, 196a; 239a-240a) during the pendency of the case. The Court denied Mr. Smith's request for the

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[1] MCL 750.224

[2] MCL 750.227

[3] MCL 750.227b

[4] MCL 750.529

[5] MCL 750.316

[6] Mr. Smith was arrested for the current case as well as charged with other offenses. 1a-2a.

appointment of appellate counsel to pursue an interlocutory appeal on the speedy trial motion. 236a-238a.

On November 4, 2005, ***Marquis Sanders*** a/k/a Quis bought cocaine from Larry Pass a/k/a Country. 305a-306a. Mr. Sanders called Mr. Pass later on to purchase more cocaine. Although Mr. Pass did not answer his phone call, Mr. Sanders went to Mr. Pass's home with Tywone Bonner and another individual. 306a-308a, 320a-321a. He entered after receiving no response to his knock on the door and saw the Complainant lying on the floor. 307a-308a. He did not call the police because he was high on cocaine (318a) and was in violation of his probation. 315a. Instead he called the friend who had introduced him to the Complainant. 308a-310a. Mr. Sanders denied killing the Complainant. 313a.

Tywone Bonner went with Marquis Sanders to Mr. Pass's home on November 5, 2005. After going to the door, Mr. Sanders returned to the car and said there was a dead guy in the house. 320a-321a.

At trial, Mr. Bonner testified that Mr. Sanders was in the home a very short time and he heard no gun shots. 322a-323a. However, he told the police that he had heard 3 to 4 shots coming from the direction of the house after Mr. Sanders went inside. At trial he stated that those shots were not from the house. 324a-325a.

Sergeant Nelson interviewed Mr. Bonner. Mr. Bonner told Sergeant Nelson that he heard three shots when he was outside Mr. Pass's home. 327a-328a.

Many people responded to the scene including EMS[7], police[8] and evidence technicians[9].

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[7] EMS is used broadly to encompass firefighters, paramedics and anyone who rendered aid.

[8] Officer Petrich; Officer Tolbert; Sergeant Coon; Sergeant Collins; Sergeant Larrison.

[9] Linda Anthony, evidence technician; Tonya Griffin, police terminal operator; Alona Smallwood, crime scene technician; Elaine Dougherty.

Shaquana Kidd and ***Tracy Woodson*** were friends. 381a (Kidd); 330a-331a (Woodson). Ms. Kidd knew Mr. Bonner and purchased drugs from Mr. Pass. 382a. On Friday night November 4, 2005, they went out and returned home around 6:00 a.m. 383a; 33a-34a.

When they returned there was a message on Ms. Kidd's answering machine from Mr. Bonner. 383a-384a. After hearing the message, Ms. Kidd went to Mr. Pass's home and found him dead. 384a. Ms. Kidd told the police that the last people around Mr. Pass were Mr. Bonner and Quis. 391a-392a.

Mark Yancy testified that he was present at Mr. Pass's home at the time of the incident. He admitted receiving $4500.00 from the federal government for his cooperation. He denied that the monetary payout had anything to do with the current case. 242a-243a, 246a.

Federal Agent Harris testified at a pretrial hearing that Mark Yancy was paid $4000 for information about Pierson-Hood[10] and the Larry Pass homicide, which specifically included information against Mr. Lard and Mr. Smith. 198a.

Mr. Yancy knew Mr. Pass as the neighborhood drug dealer and frequented his house to buy drugs. 342a-343a. Mr. Yancy had known Mr. Smith and Mr. Lard for many years and testified that they were often together. 343a-344a.

Mr. Yancy claimed he went to Mr. Pass's home twice on November 5, 2005. The first time he purchased cocaine. 345a-346a. The second time he played video games with Mr. Pass. 346a-347a.

According to Mr. Yancy, while playing video games there was a knock on the door and Mr. Pass let Mr. Smith and Mr. Lard into the house. 348a. Mr. Pass went into the bathroom to

[10] Mr. Smith and many others were originally charged with conducting a continuing criminal enterprise allegedly connected to a gang referenced as Pierson-Hood. That charge was dismissed.

get cocaine for Mr. Smith and Mr. Lard and when he returned Mr. Yancy heard multiple gunshots. 352a-353a. Mr. Lard pulled a gun on him and asked him if he knew where the dope was. 354a. He saw Mr. Smith with a gun and believed that Mr. Smith killed Mr. Pass. 365a-366a, 369a.

Mr. Yancy got the dope (an ounce of crack and an ounce of cocaine) and they all left the house together. 354a-357a. Mr. Yancy and Mr. Smith used the cocaine. 359a.

Mr. Yancy admitted that shortly before the shooting he had a dispute with Mr. Smith over money. 244a-245a. While at Mr. Pass's home he snorted cocaine and smoked marijuana. 364a.

According to ***Detective Sergeant Ainslie***, who analyzed the firearms evidence, all the bullets and casings were fired from one gun. 370a, 371a. The weapon was a 9 mm Luger caliber firearm. 372a.

Dishonder Williams, who had children with Mr. Pass, made the identification. 373a. Mr. Pass sold drugs and normally kept the door locked as he had a lot of enemies. 374a-375a, 377a-378a. He also carried a gun. 379a.

Kathleen Boyer of the Michigan State Police tested for fingerprints at Mr. Pass's home and found nothing to indicate Mr. Smith had been at the home. 380a.

Co-Defendant ***Terrance Lard*** testified in exchange for a plea deal to manslaughter and unarmed robbery. 258a, 259a, 260a. According to Mr. Lard, he and Mr. Smith went to Mr. Pass's home on November 4 or 5 (witness not sure on time) to buy drugs. 248a-249a. When they arrived, Mr. Yancy was in the home sitting on the couch. 250a.

Mr. Lard went into the living room with Mr. Yancy while Mr. Smith bought the cocaine from Mr. Pass. 251a-252a. Mr. Lard testified that Mr. Pass went into the bathroom and he then heard 5 to 6 fast, repetitive shots. 253a-254a.

According to Mr. Lard, he did not have a gun and Mr. Pass did not have a gun. 255a. Mr. Lard told Mr. Yancy to get the dope, which he did. Mr. Yancy gave the dope to Mr. Lard who turned it over to Mr. Smith and they all left. 256a. Mr. Lard knew Mr. Smith to carry a 9 mm handgun. 257a.

In July 2006, Sergeant Ellis, the Officer-in-Charge, received information that Mr. Yancy was in Mr. Pass's home at the time of the shooting. At the same time he received information that Mr. Smith and Mr. Lard killed Mr. Pass. 262a-263a.

Mr. Smith appealed by right presenting multiple issues and the Court of Appeals affirmed his convictions. 264a-270a. He then filed an application for leave with this Court resulting in the leave grant on the two issues presented.

I. THE RIGHT TO A SPEEDY TRIAL IS ENSHRINED IN THE CONSTITUTION. THE UNITED STATES SUPREME COURT HAS ADOPTED A FOUR-PART BALANCING TEST TO DETERMINE WHETHER DELAY IN TRIAL, ATTRIBUTABLE TO THE STATE, HAS RESULTED IN A VIOLATION OF THIS CONSTITUTIONAL RIGHT. THE STATE'S FAILURE TO BRING MR. SMITH TO TRIAL FOR OVER 18 MONTHS CREATED A PRESUMPTION OF PREJUDICE THAT THE STATE CANNOT OVERCOME.

Issue Preservation and Standard of Review:

The Sixth Amendment violation is an issue of constitutional law, which this Court reviews de novo. *People v Hickman,* 470 Mich 602, 605; 684 NW2d 267 (2004). Mr. Smith preserved this issue by making multiple speedy trial demands and filing two written motions to dismiss on speedy trial grounds.. 16a; 18a;

Argument:

Factual Background

There was no dispute in this case that there was a significant delay from arrest to trial. Mr. Smith was arrested in mid-December 2007 (57a-58a) and trial began in May 2011 (37a). Mr. Smith personally asserted his speedy trial rights when he was denied bond at arraignment. 61a-62a. Trial counsel filed two motions to dismiss on speedy trial grounds (16a, 18a) and Judge Farah issued a written opinion each time. 189a-195a, 196a; 239a-240a.

In the Trial Court's decision on the first speedy trial motion, the Court found 16 months of delay attributable to the prosecution. 194a-195a. The Court denied the motion finding no prejudice. 195a

In the second decision, the Court found that the delay resulting from the appointment of new counsel was attributable to the defense. 239a. The Court went on to state "While the Court recognizes that some delay was caused by correction of some of the preliminary examination

transcripts, the delay is of neutral tint because it was not caused by the People and the corrected transcript could be used to Defendant's advantage." 240a. The Trial Court's analysis of this issue was mistaken.

On June 22, 2010, it was Judge Farah who called the parties into court. 201a-211a. He indicated that he had been informed the day prior of problems with the district court transcripts (Mr. Smith had earlier brought it to the Court's attention that the transcripts were inaccurate). 201a-202a. All paries were ready for trial (214a-215a), but the Court adjourned so that the parties had time to review the corrected transcripts. 208a-209a. The Judge specifically addressed the speedy trial issue stating: "If there's any further request for a speedy trial violation, this hardly can be charged against Mr. Smith." 214a-215a.

On June 28, 2010, Trial Counsel informed the Court he would not be able to continue as counsel, thus necessitating the appointment of new counsel. 23a; 221a.

The entire delay from June 22, 2010 to May 10, 2011, over 10 months, is attributable to the State, as it was the Court's decision to delay the trial. The prosecution, Mr. Smith, and Defense Counsel, were prepared to go to trial. The only reason that the trial failed to occur was the judge's sua sponte decision to delay it. With this additional 10 month delay added to the already determined 16 month delay, the delay in bringing this case to trial was 26 months.

The Sixth Amendment and the Speedy Trial Right

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..." US Const Am VI. Michigan offers a virtually identical protection in its constitution. *See* Mich Const 1963 art I § 20.1 This right is fundamental to our system of justice and "one of the most basic rights preserved by our Constitution." *Klopfer v North Carolina,* 386 US 213, 226; 87 S Ct 988, 995; 18 L Ed 2d 1

(1967). The provision prevents persons accused of crimes from "undue and oppressive incarceration prior to trial ... anxiety and concern accompanying public accusation and ... impair[ed] ... ability ... to defend himself." *US v Marion,* 404 US 307, 320; 92 S Ct 455, 463; 30 L Ed 2d 468 (1971). As the *Marion* court observed, serious policy considerations drive the rule:

> Inordinate delay between arrest, indictment and trial may impair a defendant's ability to present an effective defense. **But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense.** To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. **Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy and create anxiety in him, his family and his friends.**

Id at 320 (emphasis supplied).

In *Barker v Wingo,* 407 US 514, 530; 92 S Ct 2182, 2192; 33 L Ed 2d 101 (1972), the Supreme Court identified four factors for lower courts to consider in evaluating whether an accused has been denied a speedy trial. They include "[l]ength of delay, the reasons for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* While a court must consider each *Barker* factor individually, no factor alone is dispositive:

> We regard none of the four factors identified ... as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, **these *factors have no talismanic qualities*; courts must engage in a difficult and sensitive balancing process. But because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the *accused's interest in a speedy trial is specifically affirmed in the Constitution.***

Id. at 533 (emphasis supplied). Analyzing Mr. Smith's case according to the *Barker* factors reveals Mr. Smith was denied his right to a speedy trial.

The Barker Factors

Factor 1: Length of Delay

Mr. Smith was arrested sometime between December 13, 2007 and December 17, 2007[11]. He languished in jail for over three years before his trial began on May 10, 2011. On June 22, 2010, all parties were prepared for trial. Judge Farah unilaterally adjourned the trial despite the apparent knowledge that any adjournment at that point would necessitate the appointment of substitute counsel given defense counsel's new employment, which prevented him from remaining as counsel in the matter.

Although the *Barker* Court's balancing test requires an *ad hoc* approach to each specific case, the Supreme Court noted in *Doggett v United States,* that "the lower courts have generally found post accusation delay "presumptively prejudicial" at least as it approaches one year. 505 US 647, 671 n4; 112 S Ct 2686, 2701; 120 L Ed 2d 520 (1992).

In this case, Judge Farah found 16 months of delay attributable to the State but discounted completely the 10 month delay from June 2010 when all parties were prepared to start trial to May 2011 when trial actually began. There would have been no further delay but for the actions of Judge Farah. The entirety of that additional delay is attributable to the State. In fact, Judge Farah specifically stated that the delay in trial could hardly be attributable to Mr. Smith. 214a-215a

An 18 month delay is presumptively prejudicial. *People v Grimmett,* 388 Mich 590, 606; 202 NW2d 278, (1972) (overruled on other grounds, 390 Mich 245; 212 NW2d 222 (1972)).

[11] The warrant authorizing Mr. Smith's arrest was dated December 13, 2007, and Mr. Smith filed a written request for court appointed counsel on December 17, 2007 (57a-58a).

Even if this Court does not find the entirety of the additional delay attributable to the State, there can be no dispute that some portion of it is attributable to the State, which brings the delay past the presumptive prejudicial delay of 18 months.

Factor 2: Reason for Delay

The Supreme Court of the United States identified three kinds of delay in *Barker:* (1) deliberate delays, for example, where a prosecutor attempts to hamper a defense; (2) neutral delays, caused by things like prosecutorial negligence or overcrowded dockets; and (3) valid delays, as might occur when something like a necessary witness is missing. *Barker*, 407 US at 531. While neutral delays may be given less weight, the court notes that "the ultimate responsibility for such circumstances must rest with the government." *Id* at 529- 531 (noting that the primary burden to assure cases are brought to trial rests with the court and the prosecutors, not defendants).

Here, the trial court initially found 16 months of chargeable delay to the prosecution. Following the denial of the first motion to dismiss on speedy trial grounds, Mr. Smith suffered continued incarceration for an additional year before the second motion to dismiss was denied and another several weeks before his trial began.

This additional delay was the result of the trial court's **sua sponte** actions. On June 22, 2010, the trial court indicated that it had been informed the day prior of problems with the district court transcripts. ***Despite both sides being ready for trial*** the trial judge unilaterally adjourned until the parties had time to review the corrected transcripts. This decision caused Mr. Smith's attorney to be unable to represent Mr. Smith, as he was moving to a new job. The trial court apparently knew that this delay would cause this issue, but delayed the trial anyways. This

necessitated the appointment of new counsel, delaying Mr. Smith's trial for over 10 additional months.

The Trial Court found that this self-caused delay did not count for speedy trial purposes, saying, "While the Court recognizes that some delay was caused by correction of some of the preliminary examination transcripts, the delay is of neutral tint because it was not caused by the People and the corrected transcript could be used to Defendant's advantage." 240a. The Court's analysis of this issue missed the mark.

First, the Supreme Court of the United States has determined that a court's actions are considered to be those of a state actor. In 2009, the Court decided *Vermont v Brillon*, a speedy trial analysis of delay caused by the Defendant's own attorney. 556 US 81; 129 S Ct 1283; 173 L Ed 2d 231 (2009). The Court stated that "**Unlike a prosecutor *or the court*, assigned counsel ordinarily is not considered a state actor.**" *Id.* at 90. The Court also highlighted the consequences of its decision that trial courts are state actors: "The State may be charged with those months if the gaps resulted from the trial court's failure[12] . . ." *Id.* at 85. Thus, the over 10-month delay caused by the court is assignable to the state, and is countable for speedy trial purposes.

Second, as previously mentioned, the government is still responsible for neutral delays, as "the primary burden [is] on the courts and the prosecutors to assure that cases are brought to trial." *Barker,* 407 US at 529. Thus, even if it was of neutral tint, it would still count as delay for speedy trial purposes.

Here, there is a minimum of 26 months of delay attributable to the State. The key question in a speedy trial claim is: "in applying *Barker,* we have asked "whether **the**

[12] In this case, the failure to appoint counsel for the unrepresented defendant.

government or the criminal defendant is more to blame for th[e] delay." *Brillon,* 556 US at 85. Under that analysis, the reason for delay in this case, the second *Barker* factor, is the government - for a minimum of 26 months of delay, if not more.

Factor 3: Defendant's Assertion of the Right

The *Barker* court emphasized the importance of a defendant asserting his right to a speedy trial:

> The more serious the deprivation, the more likely a defendant is to complain. **The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight** in determining whether the defendant is being deprived of the right.

407 US at 531-32 (emphasis supplied). The frequency and force of the objections should be weighed as well by the court, and given more weight than a mere *pro forma* objection. *Id.* at 529.

In this case, Mr. Smith asserted his right to a speedy trial from the very beginning, and repeatedly throughout his lengthy incarceration. At Mr. Smith's arraignment hearing, after being informed that he would be held without bond, Mr. Smith said, "I got something to say. I want a speedy trial." To which the Court responded "all right". 61a-62a. Mr. Smith requested a speedy trial a second time at pretrial hearing on December 21, 2007, at which the prosecution requested an adjournment which, despite Defendant's refusal to sign a waiver, was granted. After two years of waiting for his trial, Mr. Smith filed a motion in 2010 to dismiss for violation of his speedy trial right, which was denied. Mr. Smith filed another speedy trial motion a year later, which was denied as well.

Thus, as Mr. Smith asserted his right to a speedy trial numerous times throughout the course of his incarceration, *Barker* dictates that this factor weighs heavily in Mr. Smith's favor towards finding that there was a speedy trial violation.

Factor 4: Prejudice to the Defendant

Under Michigan law, if eighteen months pass between arrest and the start of trial, courts will **presume** prejudice to the defendant. *People v Grimmett, supra.* Here, since the delay exceeded eighteen months, prejudice to Mr. Smith is presumed. The People now bear the heavy burden of justifying the delay and showing that no prejudice accrued to Mr. Smith's defense or his person. *See Barker*, 407 US at 533.

Moreover, not only is prejudice presumed in this case, it can be proven. Prejudice "should be assessed in the light of the interests of defendants, which the speedy trial right was designed to protect." *Barker,* 407 US at 532. Three such interests were identified: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* The Court explained that

> "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past . . . "

Id. In the present case, both of these situations existed. For example, co-defendant Terrance Lard gave a taped statement to the police in September 2009. The tape was destroyed in a flood in the district court building. The prosecution in response to a discovery request for the taped statement provided Counsel with a one paragraph summary that was not even signed. Counsel indicated he would not be able to impeach Mr. Lard with a one paragraph summary and that the prosecution's failure to turn over the tape in a timely manner was a purposeful obstruction of discovery. Putting aside whether it was purposeful, there was no dispute that the recording was lost and could not effectively be substituted, which directly affected Trial Counsel's ability to cross examine Mr. Lard. 201a-203a. *See, e.g., People v Collins*, 388 Mich

680, 686; 202 NW2d 769, 772 (1972) (The loss of police records, amongst others, constituted actual prejudice.)

Further prejudice resulting from the delay that affected the defense of Mr. Smith was that FBI Agent Harris, who previously testified about government payments to one of the prosecution's star witnesses, did not testify at the delayed trial. Additionally, the extensive incarceration of Mr. Lard, arguably affected his willingness to cooperate, as he was unwilling to testify at the beginning of the case, but after two years of sitting in jail, he changed his mind.

"[P]rejudice to a defendant caused by delay in bringing him to trial is not confined to the possible prejudice to his defense . . . ."

> Inordinate delay, wholly aside from possible prejudice to a defense on the merits, may 'seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

Moore v Arizona, 414 US 25, 26-27; 94 S Ct 188, 190; 38 L Ed 2d 183 (1973). Mr. Smith spent almost three and a half years in jail awaiting trial.

As the *Barker* Court pointed out, while discussing the many harms of extensive pretrial incarceration, "[i]mposing those consequences on anyone who has not yet been convicted is serious." *Barker*, 407 US at 532-533. Prejudice is thus established through oppressive pretrial incarceration[13] as well.

Prejudice, however, does not need to be proven in order to prove a speedy trial violation. As the Supreme Court said, "*Barker v Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy

[13] Additionally, Mr. Smith was treated for an adjustment order while in jail, he had been enrolled and attending Baker College but lost his financial aid eligibility, and he suffered many other losses during his extensive pretrial incarceration.

trial." *Moore*, 414 US at 26.[14] Indeed, *Barker* said this explicitly: "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. . . **these factors have no talismanic qualities**; courts must still engage in a difficult and sensitive balancing process." *Barker*, 407 US at 533 (emphasis added).

The Court of Appeals' decision confuses the *Barker* test; it is a balancing test, not a checklist. Though Mr. Smith has suffered prejudice from the delay, even if he had not been able to identify specific prejudice to his case, there would still be a speedy trial violation, due to the strength and weight of the other three factors.

As the *Barker* Court cautioned, the State must resist the temptation to diminish the significance of the speedy trial right, which the framers enshrined in the very text of our Constitution. 407 US at 533 (reminding courts that because the inquiry involves a fundamental right, the process must take place with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution). Mr. Smith's speedy trial right was violated: he was in jail for 41 months before going to trial; the delay was caused largely by the government's actions -the prosecutor and the Judge; Mr. Smith repeatedly asserted his right from the very beginning; and prejudice was suffered both to his defense and to his person because of the delay. Thus, "In light of the policies which underlie the right to a speedy trial, dismissal must remain, as *Barker* noted, 'the only possible remedy'." *Strunk v United States*, 412 US 434, 440; 93 S Ct 2260, 2263; 37 L Ed 2d 56 (1973).

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[14] *See also United States v MacDonald: "The Sixth Amendment right to a speedy trial is ... not primarily intended to prevent prejudice to the defense caused by passage of time;* that interest is primarily protected by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." 456 US 1, 8; 102 S Ct 1497, 1502; 71 L Ed 2d 696 (1982) (emphasis added).

II. WITNESS MARK YANCY TESTIFIED HE RECEIVED NO MONETARY CONSIDERATION FOR HIS COOPERATION DESPITE PRIOR TESTIMONY FROM AN FBI AGENT THAT HE WAS SPECIFICALLY RENUMERATED FOR HIS COOPERATION IN THIS CASE. THE PROSECUTION FAILED TO CORRECT THAT PERJURED TESTIMONY, WHICH RESULTED IN THE DENIAL OF MR. SMITH'S DUE PROCESS RIGHTS TO A FAIR TRIAL.

Issue Preservation

This issue was not preserved but it was the prosecution that had the duty to correct the perjured testimony.

Standard of Review

A due process violation presents a constitutional question, which this Court reviews de novo. *People v Wilder,* 485 Mich 35, 40; 780 NW 2d 265 (2010).

Argument

The government's use of perjured testimony to obtain a criminal conviction violates the Due Process Clause of US Const, amend XIV. *Napue v Illinois,* 360 US 264; 79 S Ct 1173; 3 L Ed 2d 1217 (1959).

In this case, despite a nine day trial, only two witnesses were the key to the prosecution's entire case. One witness was Terrance Lard who agreed to testify against Mr. Smith only after being in jail for two years and who received a plea deal in exchange for his testimony. 258a, 259a, 260a. The other was Mark Yancy who claimed to not be involved despite his admission that he handed over cocaine to Mr. Lard and his admission that he not only left with Mr. Lard and Mr. Smith (354a-357a) after the shooting but also used cocaine with Mr. Smith (359a).

The defense theory was that Mr. Lard or Mr. Yancy shot Mr. Pass and Mr. Smith was not present or involved. 299a-302a. The defense also argued that Mr. Yancy had a motive to frame

Mr. Smith based on a prior altercation. 339a-340a. Also, while at Mr. Pass's home Yancy snorted cocaine and smoked marijuana. 364a.

Mark Yancy, who claimed to be at Mr. Pass's home at the time of the incident, was paid, according to his testimony, $4500.00 from the federal government. He testified that the payout had nothing to do with the current case. 242a-243a.

However, Agent Harris testified at a pretrial hearing that Mark Yancy was paid $4000 for information about Pierson-Hood[15] and the Larry Pass homicide, which specifically included information against Mr. Lard and Mr. Smith. 198a.

The prosecutor has a duty to correct perjured testimony not only going to the elements of the charged offense, but anything that affects the credibility of a witness. *Napue v Illinois,* 360 US at 269. As a corollary, a defendant is entitled to a new trial based on newly discovered evidence that a material witness committed perjury. *People v Barbara,* 400 Mich 352; 255 NW2d 171 (1977); *People v Cassell,* 63 Mich App 226; 234 NW2d 460 (1975).

In the present case, the prosecutor knew that several witnesses had received money from agents of the federal government. There were at least two hearings regarding the various payouts. *See generally*, 22a-228a; 231a-251a.

Agent Harris was unequivocal in his sworn testimony that the large sum of money to Mr. Yancy was for the receipt of information regarding both another case AND the Larry Pass homicide. 198a.

In this case the prosecution used perjured testimony to bolster the credibility of a witness who had every reason to frame Mr. Smith for this homicide. Mr. Yancy never disputed that (1) he was smoking cocaine and using marijuana that night, (2) he had an altercation with Mr. Smith

[15] Mr. Smith and many others were originally charged with conducting a continuing criminal enterprise allegedly connected to a gang referenced as Pierson Hood. That charge was dismissed.

just prior to this shooting, or that (3) he left with the alleged perpetrators of the shooting and used cocaine with Mr. Smith following the shooting.

Nothing about Mr. Yancy's story makes him a credible character, and the fact the he accepted a very large sum of money to implicate Mr. Smith directly would have impacted his credibility even further. Given that the jury acquitted Mr. Smith of all the gun charges despite the prosecution theory that he was the shooter arguably says something about Mr. Yancy's credibility in this matter.

The Court of Appeals concluded that Mr. Smith was not prejudiced by the uncorrected false testimony because of the "dreadful state of Yancy's credibility on the records as it is." 267a-269a. This reasoning is flawed. As this Court has recognized repeatedly, impeachment evidence is important. *See, e.g., People v Grissom*, 492 Mich 296; 821 NW2d 50 (2012); *People v Trakhtenberg*, 493 Mich 38; 826 NW2d 136 (2012); *People v Armstrong*, 490 Mich 281; 806 NW2d 676 (2011). And where impeachment evidence would have provided proof that a witness lied to the jury regarding his or her actions with regard to that very case, the fact that the witness' credibility had previously been attacked does not preclude a finding of prejudice. *See Armstrong*, 490 Mich at 292. On the contrary, there is a greater possibility that the additional attack "would have tipped the scales in favor of finding a reasonable doubt about defendant's guilt." *Id; see also Trakhtenberg,* 493 Mich at 56 ("where there is relatively little evidence to support a guilty verdict to begin with (e.g., the uncorroborated testimony of a single witness), the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt.") (internal quotation omitted).

Here, as in *Armstrong*, correction of the perjured testimony would have provided proof that Mr. Yancy lied to *this* jury about *this* case. A reasonable probability exists that had the jury

learned not only that Mr. Yancy accepted a large amount of money to implicate Mr. Smith, but that he then lied under oath about this arrangement, it would have "tipped the scales" in favor of finding a reasonable doubt.

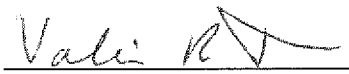
Mr. Smith is entitled to a new trial free from the taint of perjured testimony.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court vacate Mr. Smith's convictions and order dismissal of the case based on the speedy trial violation. Alternatively, Mr. Smith asks this Court to grant a new trial free from the taint of perjured testimony.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: 

VALERIE R. NEWMAN (P47291)
KATHERINE L. MARCUZ (P76625)
Assistant Defenders
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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